

# COMMUNITY COUNSEL

DECEMBER, 2013

A PUBLICATION OF WEAN & MALCHOW, P.A.

VOLUME 17, ISSUE 12

## RECENT CASES

- ◆ COURT CONSTRUCTUES SHARED USE AGREEMENT TO REQUIRE PARTIES TO SHARE ALL EXPENSES, TO ALLOW EASEMENT HOLDER TO PRIMARILY MAINTAIN THE AMENITIES, BUT TO ALLOW THE OWNER TO OTHERWISE "CONTROL" THE SHARED AMENITIES.
- ◆ TAX DEED WIPED OUT DENT FOR PAST HOA ASSESSMENTS BECAUSE TAX STATUTES ARE MORE SPECIFIC THAN HOA STATUTE ON THIS ISSUE.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

## FINING AND SUSPENSION HEARINGS

Currently, both the HOA and Condo Acts in Florida permit associations to take action against delinquent owners with a minimum of due process. In cases of unpaid obligations, an association can suspend common area use rights, voting rights and demand rents with nary a notice to the involved parties. The same is not true with regard to actions taken by an association as punishment for covenant or rule violations.

In such cases, the relevant statutes call for notice and an opportunity for hearing before the Board of Directors. The statutes also call for another hearing before an impartial committee appointed by the Board and consisting of non-Board members or their relatives.

Over several weeks last year an online discussion occurred by and among community association legal practitioners regarding these statutes and their procedural requirements. Surprisingly, the participants discovered that there were several different interpretations of the requirements imposed by these statutes and a need exists for a revision both to clarify and make consistent the practice of associations under the relevant statutes (Section 720.305 and 718.303, Fla. Stat.)

It is expected that the 2014 Florida legislative session will see at least one proposal to revise these statutes, perhaps more. In doing so, the intent should be to explain what the Board's duty is, versus the impar-

tial committee's duties and to better define the time limits for notice and actions by all involved parties.

This law firm has long espoused its own unique explanation of the current fining and suspension process. Currently there is a requirement that the alleged violator receive at least 14 days notice of the hearing at which the fine may be imposed. There is also a requirement of the meeting of the impartial committee, which has the limited power to approve or veto the action of the Board if a penalty is imposed.

Rather than fret—for example—about whether the Board meeting is or isn't the same thing as the hearing mentioned in the statute, we advise our clients to give notice to the alleged violator of the Board meeting at which the fine will be considered. We also recommend that the impartial committee meet simultaneously. Both proceedings can be considered hearings. The alleged violator can present evidence and it is heard by both the Board and the committee. If the Board fails to impose a penalty, both proceedings end. But if the Board does impose a penalty, attention then shifts to the impartial committee which, having heard the evidence and deliberations of the Board, then proceeds to uphold the Board's action or veto it, thereby simplifying and speeding up the enforcement process and—we feel—complying with the intent of both current statutes.



WEAN & MALCHOW, P.A.

646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803

TEL: (407) 999-7780

FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM

WWW.WMLO.COM

## RECENT CASE SUMMARIES

In **The Grove at Harbor Hills Homeowner's Association, Inc., vs. Harbor Hills Homeowner's Association, Inc., et al.**, 38 Fla. L. Weekly D2627b (Fla. 5<sup>th</sup> DCA, December 13, 2013), The Grove and Harbor Hills are adjacent subdivisions. The Grove owns Grove Heights Road, and its gate, guardhouse and related property, subject to an easement for ingress and egress in favor of the residents of Harbor Hills. The maintenance of, and the costs associated with, the shared amenities are the subject of a joint use agreement entered into between The Grove, Harbor Hills and the developer. The joint use agreement was the source of friction between the two associations, leading to the current litigation. Following a trial, the trial court entered a well-reasoned final judgment, concluding that the joint use agreement was valid and not terminable at will, that Harbor Hills was entitled to damages for costs related to the maintenance of the shared amenities, and that Harbor Hills had the right to control and maintain the shared amenities. On appeal to the Fifth District Court of Appeal, the appellate court affirmed the decision of the trial court in all respects except on the issue of "control" over the shared amenities. The appellate court noted that the agreement contained several relevant provisions related to the "shared" use of the amenities, the "shared" expenses of maintaining, replacing, insuring, upkeep, and taxes, and that the shared amenities "shall be maintained primarily by Harbor Hills. . . ." The trial court had concluded that Harbor Hills alone had "control" of, and maintenance responsibilities relating to, the shared amenities. It was on this issue alone that the appellate court disagreed with the trial court. The appellate court noted that the agreement did not define the term "control" and that the trial court concluded that control and maintenance are synonymous. The appellate court concluded that the agreement gave Harbor Hills primary responsibility for the maintenance of the shared amenities. However, ultimate "control" of the shared amenities, including staffing decisions, remains with its owner, The Grove, subject to the easement rights reserved to the residents of Harbor Hills.

In **Lunohah Investments, LLC, vs. Gaskell, et al.**, 39 Fla. L. Weekly D41a (Fla. 5<sup>th</sup> DCA, December 27, 2013) the issue was whether the new owner of property, acquired by tax deed, was liable to multiple associations for unpaid assessments that accrued prior to the issuance of the tax deed. Lunohah acquired the subject property by tax deed. It initiated an action to quiet title against the prior owner and two Associations holding liens on the property for unpaid assessments. No one contested the validity of the tax deed. Associations defended the quiet title action, asserting that Lunohah remained liable for the unpaid assessments by virtue of section 720.3085(2)(b), Fla. Stat., which imposes joint and several liability on a parcel owner for unpaid assessments that "came due up to the time of transfer of title." Lunohah countered that the lien and liability to pay unpaid assessments were extinguished upon issuance of the tax deed by virtue of section 197.552 and 197.575(2), Fla. Stat., which provide in essence that "covenants creating any debt or lien . . . upon . . . property . . . or requiring the grantee to expend money for any purpose" do not "survive the issuance of a tax deed." The trial judge granted summary judgment in favor of Associations, concluding that, although the liens for unpaid assessments did not survive the issuance of the tax deed by operation of chapter 197, pursuant to section 720.3085(2)(b), Lunohah remained personally liable for the assessments. On appeal to the Fifth District Court of Appeal, the appellate court noted that chapter 197 specifically addresses the survival of restrictive covenants after issuance of a tax deed. The combined effect of these statutes, as it pertains to this situation, is to preserve the validity of covenants that control the use of the property, but extinguish all such covenants, upon issuance of a tax deed, to the extent that they authorize a lien for unpaid assessments or "require the grantee to expend money." This clearly extinguishes not only the lien itself but the indebtedness, at least to the extent of the grantee's liability for the debt. On the other hand, section 720.3085 is a more general statute that purports to impose liability on any grantee for unpaid assessments, without specific reference to the manner by which the grantee acquires title. If section 720.3085 were to be construed to apply, it would be directly contradictory to the more specific provisions of chapter 197. Under basic principles of statutory construction, when two statutes embrace the same subject and produce contradictory results, courts are compelled to construe the statutes so that the specific statute is given effect. and the general statute is given effect only to the extent that it does not contradict the specific statute. Thus, the appellate court reversed the trial court, finding that the more specific provisions of chapter 197 result in both the lien, and the grantee's personal liability for the preexisting debt, being extinguished upon issuance of the tax deed.

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